STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2014
v DERRICO DEVON SEARCY, Defendant-Appellant.	No. 308101 Wayne Circuit Court LC No. 11-003373-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DARNELL ELLSWORTH HAYES, Defendant-Appellant.	No. 308527 Wayne Circuit Court LC No. 11-007953-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DELMEREY DESHAWN MORRIS, Defendant-Appellant.	No. 311177 Wayne Circuit Court LC No. 11-003373-FC

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendants Derrico Searcy, Darnell Hayes, and Delmerey Morris were tried jointly, before a single jury. The jury convicted defendant Searcy of two counts of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, felon in

possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The trial court sentenced defendant Searcy to concurrent prison terms of 40 to 60 years each for the second-degree murder convictions, 60 to 120 months for the assault conviction, 375 months to 60 years for the conspiracy conviction, and 38 to 60 months for the felon-in-possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. The jury convicted defendant Hayes of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, assault with intent to commit murder, MCL 750.83, conspiracy to commit armed robbery, felon in possession of a firearm, and felony-firearm. The trial court sentenced defendant Hayes to concurrent prison terms of life for each murder conviction, 30 to 60 years each for the assault and conspiracy convictions, and 40 to 60 months for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. The jury convicted defendant Morris of two counts of second-degree murder, assault with intent to do great bodily harm less than murder, conspiracy to commit armed robbery, and felony-firearm. The trial court sentenced defendant Morris to concurrent prison terms of 35 to 60 years each for the second-degree murder convictions, 60 to 220 months for the assault conviction, and 20 to 50 years for the conspiracy conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. All three defendants appeal as of right. We vacate defendant Hayes's conviction and sentence for second-degree murder, and vacate the convictions and sentences of defendants Searcy and Morris for one count each of second-degree murder, and remand for correction of the judgments of sentence in this regard. We also remand for correction of defendant Hayes's and defendant Morris's judgment of sentence to each reflect a conviction and sentence for conspiracy to commit armed robbery, and not armed robbery. We affirm in all other respects.

Defendants' convictions arise from the shooting death of 23-year-old Philden Reid in Detroit, Michigan, early in the evening of May 8, 2009. The prosecution's theory at trial was that Reid was shot during the defendants' planned attempt to rob him of his expensive designer sunglasses and money. The prosecution's principal witness, BT, was with the defendants during the offense. According to BT, the group of neighborhood friends, which also included Rob Stringer, was outside talking when Reid drove by wearing the sunglasses and flashing money. Upon observing Reid, defendant Hayes remarked, "There go a lick," identifying Reid as an easy robbery victim. About five minutes later, the five men got into defendant Searcy's Jeep and observed Reid's vehicle at a nearby intersection. Defendant Hayes stated, "There go the lick," and told defendant Morris, who was seated behind defendant Hayes, to give him a firearm that defendant Morris had in his pocket. While still seated in the Jeep, which was next to Reid's vehicle, defendant Hayes opened the passenger door and fired several shots toward Reid's vehicle, then stepped out of the Jeep and continued shooting. In the meantime, BT and Stringer fled from the backseat of the Jeep and, while running, BT was accidentally shot by defendant Hayes. Defendant Morris and Stringer carried BT to the Jeep, defendant Hayes reentered the vehicle, and defendant Searcy drove the men away from the scene. Reid received two gunshot wounds, one to the back and one to the thigh, and died at the scene. The defense theory for all three defendants was that they were not involved in Reid's death or an attempted robbery, and that BT was not a credible witness.

I. DOCKET NO. 308101 (DEFENDANT DERRICO SEARCY)

A. SUFFICIENCY OF THE EVIDENCE

Defendant Searcy argues that his convictions for second-degree murder, felony-firearm, and conspiracy to commit armed robbery must be vacated because the prosecution failed to present sufficient evidence that he conspired to commit armed robbery, or intended to assist the codefendants or knew that they intended to commit the crimes of second-degree murder and felony-firearm. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

1. AIDING AND ABETTING SECOND-DEGREE MURDER

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted).

At trial, the prosecutor advanced the theory that defendant Searcy was guilty of second-degree murder as an aider or abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant [either] intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (citation omitted), "or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense," *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757; *People v Bennett*, 290 Mich App 465, 474; 802 NW2d 627 (2010).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to show, first, that codefendant Hayes shot Reid in the back and thigh, causing Reid's death. Second, there was sufficient evidence that defendant Searcy assisted codefendant Hayes's commission of the offense by (1) pulling his Jeep "right next" to Reid's Buick after codefendant Hayes had identified Reid as "a lick," i.e., an easy robbery victim, (2) keeping the Jeep next to the Buick after codefendant Hayes asked for the pistol and codefendant Morris passed it to codefendant Hayes, (3) continuing to hold the Jeep's position as codefendant Hayes opened the door and, while still seated in the passenger seat next to defendant Searcy, fired several shots at Reid's vehicle, as well as when codefendant Hayes got out of the Jeep and continued firing the gun while standing next to the Jeep, (4) warning codefendant Hayes that he needed to find the gun, which codefendant Hayes announced he had lost, before they left, (5) waiting while codefendant Hayes searched for the gun, (6) leaving the scene only after codefendant Hayes found the gun and reentered the Jeep, (7) essentially acting as a getaway driver by hurriedly driving his codefendants away from the scene, and (8) masterminding a plan to obtain treatment for BT's accidental gunshot wound that sought to avoid having the group connected to Reid's killing.

Third, the evidence also was sufficient to show that defendant Searcy knew and intended for codefendant Hayes to act with malice against Reid, whom codefendant Hayes had identified as a "lick," and that defendant Searcy worked in concert with his codefendants by stopping his Jeep immediately next to Reid's car, not making any attempt to avoid the confrontation when codefendant Morris gave codefendant Hayes a firearm, continuing to wait while codefendant Hayes used the firearm to shoot at Reid's car multiple times, fleeing the scene with his codefendants only after they were all safely back inside his Jeep with the gun, and thereafter taking steps to avoid detection or having the group linked to Reid's shooting death. This evidence, considered together, was sufficient to enable the jury to find that defendant Searcy was aware that a loaded firearm was being used to carry out the attempted robbery, and that murder was a natural and probable consequence of the commission of the intended offense. Accordingly, the evidence was sufficient to support defendant Searcy's conviction of second-degree murder under an aiding and abetting theory.

2. AIDING AND ABETTING FELONY-FIREARM

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "Under the aiding and abetting statute, MCL 767.39, the correct test for aiding and abetting felony-firearm in Michigan is whether the defendant procures, counsels, aids, or abets in [another carrying or having possession of a firearm during the commission or attempted commission of a felony]." *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004) (internal quotation marks omitted). Further,

> [e]stablishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or

> encouragement is not material if it had the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant performed acts or gave encouragement that assisted in the carrying or possession of a firearm during the commission of a felony. [*Id.* at 70-71.]

Viewed in the light most favorable to the prosecution, defendant Searcy's actions and words demonstrated an intent to procure, counsel, aid, or abet the possession of a firearm during the commission of the second-degree murder. The same evidence that supports defendant Searcy's conviction of second-degree murder under an aiding and abetting theory also supports his felony-firearm conviction. After defendant Searcy stopped his vehicle next to Reid's car, with codefendant Hayes in the passenger seat, codefendant Hayes noted the presence of the "lick" and requested the firearm from codefendant Morris, who was seated behind codefendant Hayes. Codefendant Morris passed the gun to codefendant Hayes, using an opening between the two front bucket seats where defendant Searcy and codefendant Hayes were seated. A jury could infer from this evidence that defendant Searcy was aware of the presence of the gun, knew that codefendant Morris had passed it to codefendant Hayes, and knew that codefendant Hayes intended to use it. After receiving the gun, codefendant Hayes fired the gun while still seated next to defendant Searcy, stepped immediately outside the Jeep, and then fired additional shots. Defendant Searcy did not attempt to move the Jeep, or take any other averting measures, while codefendant Hayes used the firearm to shoot at Reid's car multiple times. Defendant Searcy assisted codefendant Hayes's possession of a firearm by specifically waiting as codefendant Hayes used the firearm to ultimately shoot "the lick." Defendant Searcy then further assisted codefendant Hayes's possession of the firearm when, after Hayes momentarily lost the gun, defendant Searcy directed codefendant Hayes to locate the firearm and left only after Hayes found the firearm and was back inside the Jeep. Accordingly, defendant Searcy's conviction for felony-firearm under an aiding and abetting theory is supported by sufficient evidence.

3. CONSPIRACY TO COMMIT ARMED ROBBERY

Sufficient evidence was also presented to enable the jury to infer that defendant Searcy conspired with the codefendants to commit armed robbery. Conspiracy is a specific intent crime, requiring the intent to combine with others and the intent to accomplish an illegal objective.[1] MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). To prove the intent to combine with others, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476, 482, 485; 505 NW2d 843 (1993). For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. *Id*.

Defendant Searcy's and the codefendants' interactions and concordant behavior was evidence of their concert of action, which created an inference of conspiracy. Contrary to what

[1] The elements of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it is a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529.

defendant Searcy argues, direct proof of a conspiracy is not essential. Rather, a conspiracy may be proven by circumstantial evidence or by reasonable inference, and no formal agreement is required. *People v Justice* (*After Remand*), 454 Mich 334, 347; 562 NW2d 652 (1997); *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). Although defendant Searcy suggests alternative ways of viewing the evidence, it was up to the trier of fact to evaluate the evidence and, for purposes of resolving this sufficiency challenge, this Court is required to view the evidence in a light most favorable to the prosecution. *Wolfe*, 440 Mich at 515. Defendant Searcy emphasizes BT's testimony that it was mere coincidence that the group just happened upon Reid's Buick, after driving in the opposite direction. Even if that is true, that fact did not preclude the jury from inferring the existence of a conspiracy to rob Reid in light of the other evidence. More importantly, the credibility of BT's testimony was for the jury to determine, *id.* at 514, and the jury was entitled to accept or reject any of part of it. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant Searcy's conviction of conspiracy to commit armed robbery.

B. DOUBLE JEOPARDY

Defendant Searcy argues that his two second-degree murder convictions, arising from the shooting death of a single victim, violate his double jeopardy right not to be subjected to more punishment than intended by the Legislature. Plaintiff concedes, and we agree, that one of defendant Searcy's convictions for second-degree murder must be vacated. All three defendants were charged with alternative counts of first-degree felony murder and first-degree premeditated murder in connection with the shooting death of Reid. The jury convicted Reid of the lesser offense of second-degree murder for both counts. It is well established that multiple murder convictions arising from the death of a single victim violate double jeopardy principles, and the remedy is to vacate one of the murder convictions. *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000); *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Accordingly, we vacate one of defendant Searcy's second-degree murder convictions and the accompanying sentence and remand for correction of his judgment of sentence to reflect only one conviction and sentence for second-degree murder.

II. DOCKET NO. 308527 (DEFENDANT DARNELL HAYES)

A. RIGHT TO A PUBLIC TRIAL

Defendant Hayes argues that his right to a public trial was violated when the trial court closed the courtroom to the public during BT's testimony. Defendant Hayes concedes that he did not object to the partial closure at trial, leaving this issue unpreserved. We therefore review this issue for plain error affecting his substantial rights. *People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012).

Both the federal and state constitutions guarantee a criminal defendant the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *Vaughn*, 491 Mich at 650. Although the right is not absolute and may be limited, *id.* at 653, to facilitate appellate review of whether the trial court's decision to close the courtroom was proper, a trial court must state the interest that justified the closure and articulate specific findings that explain why that interest justified the closure. *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). Further, the closure

must be no broader than needed to protect the interest justifying it, that is, it must be "narrowly tailored" to satisfy the purpose for which closure was ordered. *Id.* at 169, 171. There is also a distinction between partially and fully closing courtrooms to the public. *Id.* at 169-170. "[T]he effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling reason for the closure is required." *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012). This case involves only a partial closure because the parents of the defendants were allowed to remain in the courtroom during BT's testimony.[2]

The record establishes a substantial reason for the partial courtroom closure, namely the avoidance of witness intimidation, and that the closure did not unnecessarily interfere with defendant Hayes's right to a public trial. The nature of the offenses involved a group of friends who participated in a murder during an attempted robbery. BT was with the defendants at the time of the crimes and decided to testify against them after they were no longer on good terms. Before BT testified, the prosecutor asked the trial court to exclude the public from the courtroom. The prosecutor explained that BT, the prosecution's chief witness, had been threatened after he started testifying in these cases, and that he had to be moved from several different prisons because of the threats. The prosecutor argued that this history demonstrated a likelihood that BT could be inhibited when testifying in open court if the defendants' parents, family, and friends were present in the courtroom.

We believe that the history of prior threats against BT and the interest in preventing witness intimidation in the courtroom during trial testimony was sufficient to justify a partial closure of the courtroom to protect the integrity of the judicial system. In addition, the trial court narrowly tailored the closure by limiting it to the testimony of BT, the one witness who had been threatened, and by allowing the defendants' parents to remain in the courtroom during his testimony. Under the circumstances, the partial closure of the courtroom was not plain error.

B. EFFECTIVE ASSISTANCE OF COUNSEL

In a related claim, defendant Hayes argues that defense counsel was ineffective for failing to object to the partial closure of the courtroom. Because defendant Hayes failed to raise an ineffective assistance of counsel claim in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, our review of this issue is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, the defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been

[2] "A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain, or when the closure is narrowly tailored to specific needs." *Kline*, 197 Mich App at 170 n 2 (citations omitted).

different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). The defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The public trial right benefits a defendant by ensuring a fair trial, ensuring that the judge and prosecutor carry out their duties responsibly, discouraging perjury, and encouraging witnesses to come forward. See *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984). Defendant Hayes does not contend, and there is no indication, that any of these values were jeopardized in this case. Further, as previously discussed, considering the importance of BT's testimony, the history of prior threats against BT, that the closure was limited to BT's testimony, and that the court allowed the defendants' parents to remain in the courtroom, the partial closure was not plainly improper under the circumstances. Accordingly, defense counsel's failure to challenge the partial closure was not objectively unreasonable. *Armstrong*, 490 Mich at 289-290. Thus, defendant Hayes has failed to establish that defense counsel was ineffective in this regard.

C. EVIDENCE OF THREATS

Defendant Hayes next argues that the trial court erred by permitting the jury to hear evidence that BT had been threatened and was the victim of "gang intimidation." At trial, the prosecutor argued that the evidence was relevant to BT's credibility. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *Id.* (citation omitted). In a criminal case, if error is found, reversal is not required unless the defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error, meaning the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The thrust of defendant Hayes's argument, namely that BT was subjected to "gang intimidation," is misplaced. As plaintiff accurately observes, although defendant Hayes was alleged to be a member of the Hustle Boys gang, there was no evidence that the charged offense was gang related and, accordingly, the trial court prohibited any references to gang membership at trial. Defendant Hayes has not identified any portion of the record where evidence of his membership in the Hustle Boys gang, or evidence that the Hustle Boys were the source of any intimidation aimed at BT, was presented to the jury. This Court will not search for a factual basis to sustain or reject a defendant's position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

We conclude, however, that the trial court abused its discretion by allowing evidence of unspecified threats against BT. Threats against witnesses are relevant and generally admissible to demonstrate a defendant's consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). This is true, however, only where there is evidence connecting the defendant to such threats. *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985); *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). In this case, the threats against BT were not directly connected to defendant Hayes or any other defendant, and were not offered to demonstrate consciousness of guilt. Rather, the testimony was admitted for the sole purpose of assessing BT's credibility. Evidence of threats against a witness is relevant to witness bias when there is an indication that the witness was reluctant to testify against the defendant, *People v*

Johnson, 174 Mich App 108, 112; 435 NW2d 465 (1989), or to explain inconsistencies in a witness's behavior or statements. *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983). But here, although BT was threatened, there is no indication that he was ever unwilling to testify against the defendants because of the threats.[3] The prosecutor acknowledged as much during her argument, noting that BT continues to testify despite being threatened. Therefore, the testimony regarding threats from unknown sources should not have been admitted.

We conclude, however, that any error in allowing the evidence of the threats was harmless because defendant Hayes has not established a reasonable probability that this evidence was outcome determinative. *Lukity*, 460 Mich at 496. Again, the reference to the threats did not identify defendant Hayes or another defendant as the source, so it is not more probable than not that the jury considered the evidence to conclude that either defendant Hayes or another codefendant had a consciousness of guilt. Further, to the extent that the evidence was offered as being probative of BT's credibility, as we have previously indicated, it had little if any relevance to that issue. Moreover, the issue of BT's credibility, including his motivation for testifying and the existence of other possible influences on his testimony, was explored at length by all three defendants. Considered in light of the weight and strength of the untainted evidence, we are not persuaded that it is more likely than not that the evidence of the unspecified threats affected the outcome of the trial. Accordingly, the trial court's evidentiary decision, even if error, was harmless.

D. USE OF A FALSE NAME

Defendant Hayes next argues that the trial court abused its discretion when it allowed evidence that he gave a false name at the time of his arrest. We disagree.

In July 2011, an outstanding homicide warrant existed for defendant Hayes's arrest for the charges in this case. A police officer testified that on July 24, at approximately 1:30 a.m., he observed a person who smelled of intoxicants sleeping on a bench. He asked the person for his name and identification. The person identified himself as Michael Bell. The person was arrested for disorderly conduct. While at the police station, the person was fingerprinted and the prints were entered into a database, which later disclosed that the prints belonged to Darnell Hayes and provided a "mug shot" of defendant Hayes. The officer used the photograph to verify that the person who had identified himself as Michael Bell was actually Darnell Hayes.

We disagree with defendant Hayes's argument that his use of a false name was not relevant evidence in this case. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "A jury may infer consciousness of guilt from evidence of lying or deception." *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). Evidence that a defendant gave a false name to the police may also be used to show consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993), overruled on other grounds, *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996). "A trial court admits relevant evidence to provide the trier of fact with as much useful

[3] Plaintiff concedes that the evidence was not offered to explain any inconsistencies.

information as possible." *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011). The evidence that defendant Hayes lied to the police in an attempt to conceal his identity was relevant to show his consciousness of guilt. Defendant Hayes argues that he could have lied about his identity because he was conscious of a different and unrelated outstanding warrant, but the existence of another plausible reason for defendant Hayes's use of a false name merely created an issue of fact for the jury to resolve; it does not affect the admissibility of the evidence.[4]

Further, we are not persuaded that the evidence should have been excluded because it was unduly prejudicial. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Cameron*, 291 Mich App at 610. MRE 403 is not intended to exclude "damaging" evidence, because any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Instead, under the balancing test of MRE 403, this Court must first decide if the prior bad-acts evidence was unfairly prejudicial, and then "'weigh the probativeness or relevance of the evidence' against the unfair prejudice" to determine whether any prejudicial effect substantially outweighed the probative value of the evidence. *Cameron*, 291 Mich App 611. Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it." *Mills*, 450 Mich at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). In the second situation, the unfair prejudice language "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Cameron*, 291 Mich App 611 (citation omitted).

The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Although defendant Hayes asserts that the evidence was inherently prejudicial, we are not persuaded that the jury was not capable of rationally weighing the evidence. Moreover, in its final instructions, the trial court gave a cautionary instruction to limit the potential for any prejudice.[5] Juries are presumed to follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Under the circumstances, the trial court's decision to allow the evidence was not an abuse of discretion. *Feezel*, 486 Mich at 192.

E. DEFENDANT HAYES'S STANDARD 4 BRIEF

Defendant Hayes raises five additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

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[4] Defense counsel was free to make that argument during closing argument, which he did.

[5] The court instructed the jury that evidence that Hayes used a false name "does not prove guilt" because "a person may give a false name for innocence reasons such as panic, mistake, fear or misunderstanding." The court advised the jury that it "must decide whether the evidence is true and if true whether it shows the defendant had a guilty state of mind."

1. TESTIMONY REGARDING DEFENDANT HAYES'S "MUG SHOT" AND ARREST

Defendant Hayes argues that the admission of testimony regarding his prior arrest for disorderly conduct and the fact that he had a mug shot prejudiced him in the eyes of the jury and denied him a fair trial. Because defendant Hayes did not object to the testimony regarding his mug shot or to his arrest for being a disorderly person, these issues are unpreserved and our review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

The officer's references to defendant Hayes's mug shot and arrest for being a disorderly person were made in the context of explaining the circumstances surrounding the discovery of defendant Hayes's true identity after he gave the police a false name. As previously indicated, defendant Hayes's use of a false name was relevant to his consciousness of guilt. The disorderly conduct arrest and the mug shot evidence was necessary to explain how the officer discovered that defendant Hayes had given a false name. A jury is entitled to hear the complete story. *Sholl*, 453 Mich at 742. Accordingly, there was no plain error. Further, the fleeting references to this evidence did not affect defendant Hayes's substantial rights. The officer never provided any details about defendant Hayes's prior criminal history. Moreover, there was no reasonable likelihood that the jury would use evidence of defendant Hayes's *arrest* for a transitory disorderly conduct offense to conclude that he must be guilty of the dissimilar and much more serious charged offenses, including murder. In addition, because there was no indication in this testimony that defendant Hayes had been convicted of any offense, his claim that the references improperly allowed the jury to hear evidence of his prior convictions lacks merit. The brief reference to either the arrest or the mug shot also cannot be considered unduly prejudicial where, in connection with the felon-in-possession charge, defendant Hayes stipulated that he had a prior conviction. Thus, the jury was already aware that defendant Hayes was a convicted felon. For all of these reasons, there was no plain error affecting defendant Hayes's substantial rights.

2. RIGHT TO NOTICE OF CHARGES

We also reject defendant Hayes's argument that his due process right to adequate notice of the charges against him was violated because the "intent to kill" element for first-degree felony murder was not "spelled out" in the information. Because defendant Hayes did not object to the information or otherwise raise this notice issue at trial, the issue is unpreserved and our review is limited to plain error affecting his substantial rights.

"A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). An information provides adequate notice when it informs the defendant of the charges he will have to defend against. *Id.* "An information is presumed to be framed with reference to the facts disclosed at the preliminary examination." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

The information, coupled with the preliminary examination, was constitutionally sufficient to place defendant Hayes on notice of the charges against him. The information alleged in count 1 that defendant Hayes "did while in the perpetration or attempted perpetration of a larceny, murder one Philden Reid, contrary to MCL 750.316(1)(b)," an offense punishable by "[l]ife without parole." The information satisfied the requirements of MCR 6.112(D) and

MCL 767.45. Although defendant Hayes complains that the information did not contain notice of an "intent to kill" theory in support of the felony-murder charge, he presents no explanation of how his defense might have differed had this element been listed. Regardless, we find no merit to defendant Hayes's argument that he did not have notice that he would be required to defend against a charge that he acted with an intent to kill. Defendant Hayes's argument ignores that he was also charged with first-degree premeditated murder for the death of Reid. The information for the first-degree murder charge specifically alleged that defendant Hayes "did deliberately, *with the intent to kill* . . . murder" Reid (emphasis added). In addition, at the preliminary examination, the prosecutor argued that the evidence that defendant Hayes shot a gun multiple times toward Reid's vehicle established that he had the "clear" intent to kill. Because defendant Hayes was fully apprised of the nature of the charges against him and his ability to defend against those charges was not prejudiced, there was no plain error and no violation of his due process rights. *Carines*, 460 Mich at 763.

3. PROSECUTOR'S CONDUCT

We also reject defendant Hayes's unpreserved argument that he was denied a fair trial by the prosecution's failure to provide notice of the evidence of his arrest for disorderly conduct and his mug shot pursuant to MRE 404(b)(2). MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime, but allows such evidence when offered for other, noncharacter purposes. As previously discussed, the references to defendant Hayes's mug shot and arrest were made in the context of explaining how the police were able to discover that defendant Hayes had used a false name upon his arrest, which was relevant to show consciousness of guilt. MRE 404(b) is not implicated where evidence is intended to give the jury an intelligible presentation of the full context in which disputed events occur. *People v Malone*, 287 Mich App 648, 661-662; 792 NW2d 7 (2010). Thus, this testimony was not subject to MRE 404(b)(1) and the prosecutor was not bound to comply with the notice requirements of MRE 404(b)(2). See *Malone*, 287 Mich App at 662 (MRE 404(b) was not implicated where the challenged evidence was offered to show how investigators came to focus on the defendant and, therefore, the prosecution was not required to file a motion to admit the evidence). Accordingly, defendant Hayes has not demonstrated a plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

4. EFFECTIVE ASSISTANCE OF COUNSEL

In a claim related to other issues raised on appeal, defendant Hayes argues that defense counsel was ineffective for (1) failing to object to the testimony regarding defendant Hayes's prior arrest and the fact that the officer used a mug shot to ascertain defendant Hayes's identity, failing to ask for a cautionary instruction pertaining to that testimony, and failing to request a mistrial because of the testimony, and (2) failing to object to the information that charged defendant Hayes with first-degree felony murder without listing the intent to kill element. Although defense counsel did not object to the references to defendant Hayes's mug shot or arrest for being a disorderly person, as we have previously discussed, the introduction of this evidence was not plain error and did not affect defendant Hayes's substantial rights. Accordingly, defendant Hayes has not shown that counsel's failure to either object to the evidence or request a cautionary instruction or mistrial was objectively unreasonable, or that he was prejudiced by the fleeting references. *Armstrong*, 490 Mich at 289-290. Further, as also previously discussed, the information, coupled with the preliminary examination, fully apprised

defendant Hayes of the charges he would have to defend against. Accordingly, there was no viable basis for objecting to the information or the jury instructions that listed the elements. Defense counsel cannot be deemed ineffective for failing "to advocate a meritless position." See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

5. DOUBLE JEOPARDY

Plaintiff concedes, and we agree, that defendant Hayes cannot properly stand convicted of both first-degree felony murder and second-degree murder arising from the death of a single victim. Accordingly, we vacate defendant Hayes's second-degree murder conviction and accompanying sentence and remand for correction of his judgment of sentence in this regard. *Clark*, 243 Mich App at 429-430; *Bigelow*, 229 Mich App at 220.

Defendant Hayes's additional argument that he was improperly convicted of both first-degree felony murder and the underlying offense of armed robbery is misplaced. Defendant Hayes was not charged with or convicted of armed robbery, although his judgment of sentence erroneously indicates that he was convicted of that offense. Defendant Hayes was actually convicted of conspiracy to commit armed robbery. Accordingly, on remand, the trial court shall also correct this clerical error. MCR 6.435(A); MCR 7.216(A)(7).

III. DOCKET NO. 311177 (DEFENDANT DELMEREY MORRIS)

A. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant Morris argues that he is entitled to a new trial because trial counsel was ineffective for failing to use evidence that Sgt. Diaz told BT that he was protecting him from being targeted in a federal investigation of members of the Hustle Boys gang. Defendant Morris argues that this evidence was valuable evidence that could have been used to impeach the trial testimony of Sgt. Diaz and BT that no benefits were offered to BT in exchange for his testimony. The trial court denied defendant Morris's motion for a new trial with respect to this issue after conducting a postjudgment *Ginther* hearing.

We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A claim alleging ineffective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and the trial court's findings of fact are reviewed for clear error. *Id.* As previously indicated, effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *Pickens*, 446 Mich at 302-303; *Effinger*, 212 Mich App at 69. "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012). "[A] reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." *Id.* at 22-23.

Defendant Morris has not overcome the strong presumption that trial counsel's performance was within the range of reasonable professional conduct. Although there were indications that defendant Morris was connected to the Hustle Boys, a notorious criminal gang, defense counsel was successful in obtaining a pretrial ruling prohibiting any gang connection references. At the posttrial *Ginther* hearing, defense counsel explained that he did not cross-examine the witnesses about the federal investigation of the gang because he did not want to risk "opening the door" to any evidence regarding the Hustle Boys. Trial counsel noted that, although excluding the evidence, the trial court warned that if "the door" was opened "all bets might be off." Counsel explained that "the last thing [he] wanted to do was introduce testimony of the hustle boys because that's . . . what the prosecutor would have wanted." Contrary to what defendant Morris argues, there is no indication that trial counsel misunderstood the parameters of the trial court's pretrial ruling. Rather, counsel's decision was a tactical choice, based on his decision to completely avoid the issue of gang involvement. This decision was not objectively unreasonable given that the federal investigation that Sgt. Diaz was supposedly protecting BT from solely concerned the Hustle Boys gang.

Furthermore, the record indicates that trial counsel, and the codefendants' attorneys, had other available means for attacking the credibility of BT and Sgt. Diaz, and that they vigorously and effectively did so. Under the circumstances, trial counsel's decision not to additionally impeach BT and Sgt. Diaz in a manner that would risk the introduction of defendant Morris's gang involvement was within the purview of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and did not fall below an objective standard of reasonableness, *Armstrong*, 490 Mich at 289-290. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). While defendant Morris suggests that trial counsel could have tried to admit the information by redacting it, this Court does not second-guess counsel on matters of trial strategy. *Russell*, 297 Mich App at 716.

We also disagree with defendant Morris's characterization of the value of this evidence for impeachment. Any inference that BT's testimony was induced by Sgt. Diaz's offer to protect him from the federal investigation is not as strong as defendant Morris asserts. Sgt. Diaz's interview with defendant Morris took place on October 9, 2009. Two days earlier, Sgt. Diaz first interviewed BT and, at that time, BT described what happened, including who was involved and each person's role. Thus, by the time the sergeant provided the alleged inducement of protection, BT had already come forward. In addition, there is no evidence of an actual federal indictment targeting BT that Sgt. Diaz could have taken care of, or, more importantly, no evidence that BT actually believed that he was being targeted to the extent that he would have been induced by the "gift" of protection. When Sgt. Diaz broached the subject, BT responded, "But I'm not a hustle boy," and Sgt. Diaz responded that he did not think BT was hustle boy. Under the circumstances, it was not unreasonable for defense counsel to question the value of this impeachment evidence and to conclude that any value the evidence could provide did not outweigh the risk of opening the door to the introduction of evidence of defendant Morris's affiliation with the Hustle Boys's gang, which counsel had successfully fought to exclude.

For these reasons, defendant Morris has not shown that trial counsel was ineffective in his handling of this issue.

B. JOINT TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL

Defendant Morris also argues that trial counsel was ineffective for failing to move for a separate trial or a separate jury. We disagree.

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 345; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). In order to make this showing, a defendant must provide the court with a supporting affidavit, or make an offer of proof, showing that the defenses are so inconsistent, mutually exclusive, and irreconcilable that it "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id.* at 346-347. Mere inconsistency of defenses is not enough to require severance; the defenses must be mutually exclusive or irreconcilable. *Id*. at 349. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* (citation omitted). Also, "finger pointing" is not a sufficient reason to grant separate trials. *Id*. at 360-361. In sum, severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id*. at 359-360.

To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and orderly administration clearly favored a joint trial. Defendant Morris has not provided any concrete facts or reasons to justify separate trials, and has not persuasively demonstrated that his substantial rights were prejudiced by a joint trial. The record does not show a "significant indication" that the requisite prejudice in fact occurred at trial. *Id*. at 346-347. Defendant Morris's defense theory was that he was not present, and that BT was not credible. All three codefendants asserted the same argument (i.e., that BT was untruthful) and the same defense (i.e., that they were not involved in Reid's death or any other crime). None of the defendants elected to testify or present a defense, so no defendant pointed the finger at another defendant during trial. Thus, the jury was not required to believe one defendant at the expense of another and, in fact, it did not. Defendant Morris and codefendants Hayes and Searcy were each convicted of Reid's murder, BT's assault, and conspiracy to commit armed robbery.[6] Defendant Morris suggests,

[6] Defendant Morris argues that "the fact that the jury convicted Morris and Searcy of the lesser included offenses of second-degree murder, but convicted Hayes of first-degree felony murder indicates that the jury found Hayes more culpable." This does not support a basis for severance or reflect that defendant Morris was actually prejudiced by being tried jointly. On the contrary, the evidence suggests that the jury convicted codefendant Hayes of the greater offense of first-

without any logical basis, that the evidence linking codefendant Searcy, the driver, to the type of vehicle used during the shooting would not have been admissible against him in a separate trial. We find no basis for this statement. "[A] fair trial does not include the right to exclude relevant and competent evidence," *id.* at 350, and evidence regarding the Jeep that defendant Morris and his codefendants allegedly used during the crimes would have been both relevant and admissible. MRE 401. Finally, any risk of prejudice from a joint trial may be allayed by a proper cautionary instruction. *Hana*, 447 Mich at 351, 356. In this case, the trial court appropriately instructed the jury that each case was to be decided separately.

Defendant Morris has failed to identify any trial rights that were violated or demonstrate how the jury's verdict was unreliable because of the joint trial. We conclude that there was no basis for severance. Accordingly, defense counsel's failure to request was not objectively unreasonable. Counsel was not required to file a meritless motion. *Snider*, 239 Mich App at 425.

C. GREAT WEIGHT OF THE EVIDENCE

Defendant Morris also argues that, because BT was not a credible witness, the jury's verdict is against the great weight of the evidence. We disagree.

A new trial may be granted if a verdict is against the great weight of the evidence. *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012). In evaluating whether a verdict is against the great weight of the evidence, a court must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *Unger*, 278 Mich App at 232. A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Absent compelling circumstances, the credibility of witnesses is for the jury to determine. See *Lemmon*, 456 Mich at 642-643.

In support of his argument that BT was inherently incredible, defendant Morris asserts that BT had a substantial reason to lie because Sgt. Diaz assured BT that he would be spared from a federal indictment. However, there was no evidence presented at trial or at the posttrial evidentiary hearing that BT was able to avoid a federal indictment in exchange for testifying for the prosecution in this case. To the contrary, BT, Sgt. Diaz, and BT's trial counsel all testified that BT never received any consideration or "anything" for his testimony in this case. Defendant Morris also emphasizes BT's testimony that he only decided to come forward and talk to Sgt. Diaz because he was angry with the defendants and felt abandoned, and to avoid being charged for his participation in the shooting. The jury was aware that BT came forward to avoid getting into trouble and because he felt betrayed by the defendants, and the defendants presented

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degree felony murder because he was the person who actually shot Reid. The different verdicts reflect the jury's effort to determine the individual culpability of each defendant based on his particular conduct. Moreover, "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials[.]" *Hana*, 447 Mich at 350.

credibility arguments based on this testimony to the jury. A reviewing court should ordinarily defer to the jury's determination of credibility "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities[.]" *Lemmon*, 456 Mich at 645-646 (citation omitted). That clearly is not the case here. There is nothing in the record to warrant the unusual step of overriding the jury's credibility determination. The jury's verdict is not against the great weight of the evidence. Thus, defendant Morris is not entitled to a new trial on this basis.[7]

D. DOUBLE JEOPARDY

Lastly, plaintiff concedes, and we agree, that defendant Morris cannot properly stand convicted of two counts of second-degree murder arising from the death of a single victim. Accordingly, we vacate one of defendant Morris's second-degree murder convictions and the accompanying sentence, and we remand for correction of his judgment of sentence to reflect only one conviction and sentence for second-degree murder. *Clark*, 243 Mich App at 429-430; *Bigelow*, 229 Mich App at 220. In addition, defendant Morris's judgment of sentence inaccurately indicates that he was convicted of armed robbery instead of conspiracy to commit armed robbery. Accordingly, on remand, the trial court shall also correct this clerical error. MCR 6.435(A); MCR 7.216(A)(7).

Affirmed in part, vacated in part, and remanded for correction of the judgments of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra

[7] Defendant Morris notes that in denying his motion for a new trial, the trial court used the phrase "sufficient evidence" when ruling on the great weight of the evidence. However, the parties' preceding arguments make it clear that the court was aware that defendant had raised an issue challenging the great weight of the evidence. Viewed in context, it appears that the court simply misspoke. Regardless, the trial court reached the right result in denying defendant's motion. Therefore, the trial court's misstatement is not a basis for reversal. *People v Goold*, 241 Mich App 333, 342 n 3; 615 NW2d 794 (2000).